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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

TOWNSHIP OF EDISON, NEW JERSEY,

Petitioner,

vs.

MARCOS SKEVOFILAX, LOUISE SKEVOFILAX, MICHAEL
MICHAELS, SERGEANT WILLIAM QUIGLEY,
PATROLMAN CHARLES L. FEKETE and PATROLMAN
DOMINICK SEMENZA,

Respondents.

*On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

**BRIEF IN OPPOSITION FOR RESPONDENTS MARCOS
SKEVOFILAX, LOUISE SKEVOFILAX AND MICHAEL
MICHAELS**

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TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| Statement of the Case | 2 |
| A. Background of the Underlying Action..... | 2 |
| B. Post-Judgment Proceedings | 4 |
| C. The Proceedings in the United States Court of Appeals for the Third Circuit | 6 |
| Summary of Judgment..... | 10 |
| Argument: | |
| I. Rule 69 and New Jersey practice and procedure conferred jurisdiction on the District Court, as a proceeding supplementary to and in aid of execution of a federal judgment, to adjudicate the respondents' claims; principles of equity and policies of judicial efficiency and economy were present to justify the District Court's exercise of its ancillary jurisdiction. The petition does not present an important question of federal law. | 11 |
| II. The <i>En Banc</i> Opinion of the Third Circuit is not in conflict with the opinion of the Fifth Circuit in <i>Berry v. McLemore</i> , 795 F.2d 452 (5th Cir. 1986); the opinions are consistent in their rationale, and in their application of principles and policies; they are merely distinguished by their factual differences..... | 15 |
| Conclusion | 18 |

Contents

Page

TABLE OF CITATIONS

Cases Cited:

| | |
|--|----------------|
| Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982) | 15, 17 |
| Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986) | 15, 16, 17, 18 |
| Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980) | 11 |
| Green v. Benson, 271 F. Supp. 90 (E.D. Pa. 1967) | 11 |
| Resident Advisory Board v. Rizzo, 526 F. Supp. 778 (E.D. Pa. 1981) | 11 |
| Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 18 L.Ed. 768 (1868) | 11 |
| Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982) | 11 |
| United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) | 12 |
| Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515 (9th Cir. 1983) | 11 |

Statutes Cited:

| | |
|----------------------------|-------|
| 42 U.S.C. § 1983 | 2, 15 |
| 42 U.S.C. § 1988 | 4 |

Contents

Page

Rules Cited:

Fed. R. Civ. P. 13(g)7, 9, 10

Fed. R. Civ. P. 694, 5, 6, 7, 8, 9, 11, 14, 17

Fed. R. Civ. P. 69(a)10, 11

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STATEMENT OF THE CASE

A. Background of the Underlying Action

Respondents Marcos Skevofilax, Louise Skevofilax and Michael Michaels instituted an action in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983, alleging that their constitutional rights had been violated in October, 1977 by various police officers in the employ of and pursuant to their duties as police officers with the Township of Edison, New Jersey, and by the Township itself. Respondents also pleaded pendent state claims against the police officers and the Township.

Pursuant to the provisions of a collective bargaining agreement between the Township and the police officers' union, the Township's Town Council passed a unanimous resolution in November, 1978 that the respondents Sergeant Quigley and Patrolmen Fekete and Semenza, were police officers on active duty at the time of the incident in question, and were thus entitled to defense counsel provided and paid for by the Township.

The Township was represented in the civil rights action both by its Township Attorney, and by counsel provided by its insurance carrier. The police officers were each represented by separate counsel provided and paid for by the Township pursuant to the Township's resolution and the existing collective bargaining agreement.¹

1. A mistrial was declared in the first civil rights trial held before U.S. District Judge Ackerman. The court, *sua sponte*, found conflicts of interest among all the police officers, and held that no two could be represented by the same counsel. Under the collective bargaining agreement the court ruled that the Township had to provide separate defense counsel for each police officer defendant.

A seven-week trial before United States District Judge Barry resulted in a jury finding, pursuant to special interrogatories, that the police officers had violated the respondents' civil rights and had falsely arrested respondents Marcos Skevofilax and Michael Michaels, had maliciously prosecuted both respondents, and had assaulted Marcos Skevofilax. Additionally, the jury found the Township negligent. Substantial damages were awarded to all respondents against both the police officers and the Township itself.

No appeal was taken from the final judgments entered against the Township and the police officers.

It was not disputed at trial that the police officers had acted under color of state law and pursuant to the authority given them by the Township to make arrests, investigate crimes, and lodge criminal charges. In fact, in its charge to the jury the District Court instructed:

I charge you that the defendant police officers do not contest the fact that whatever actions they took with respect to plaintiffs Marcos Skevofilax and Michael Michaels, they did so in their capacity as officers of the police force of the Township of Edison. Therefore, the elements of plaintiffs' claim which requires that the defendants have acted under color of state law must be taken by you as proven.

Neither the Township nor the police officers objected to the court's charge (*En Banc* Opinion, Appendix A at 10a-11a; Hearing held April 25, 1985 in the United States District Court, Appendix C at 82a, 89a, 97a-99a).

The unappealed judgments included an award of attorney's

fees against the police officers pursuant to 42 U.S.C. § 1988.

B. Post-Judgment Proceedings

Although the final federal judgments against the Township and its police officers were entered in November, 1984, as of April, 1985 none of these judgments had been satisfied, in whole or in part. As a result of this recalcitrance, execution was made by the U.S. Marshall upon the Township's assets. At the same time, respondents initiated proceedings for garnishment of the police officers' salaries. A hearing on the attachment and garnishment proceedings, pursuant to Rule 69 of the Federal Rules of Civil Procedure, was held before the District Court on April 15, 1985. On the return date the police officers objected to the garnishment proceedings on the ground that pursuant to their union's collective bargaining agreement, their employer, the Township, was responsible for paying not only the judgment entered against the Township, but also the judgment entered against its police officers.

The collective bargaining agreement as well as the Township's 1978 resolution had been the subject of testimony during the trial, and were submitted to the District Court in support of the Rule 69 proceedings (*En Banc* Opinion, Appendix A at 5a). Article IX of the agreement, entitled "Insurance and Legal Representation" provided:

In the event of a judgment against a member of the bargaining unit arising out of or incidental to the performance of his duty, the Employer agrees to pay for said judgment or arrange for the payment of said judgment.

En Banc Opinion, Appendix A at 3a-4a; Hearing held April 25, 1985 in the United States District Court, Appendix C at 91a.

Indeed, another provision of the same agreement precluded the Township from providing defense counsel in civil litigation arising from acts, conduct and/or events outside of the scope of its police officers' employment.

As a result of the April 15th hearing, respondents moved pursuant to Rule 69 for an order directing the Township to pay the outstanding federal judgments entered against itself as well as against its police officers. All parties were served with the respondents' moving papers, and a hearing on the motion was held on April 25, 1985. The judgment debtor police officers appeared by counsel and joined in and supported respondents' motion. The Township also appeared, again represented by its Town Attorney and counsel provided by its insurance carrier.

In response to the Rule 69 proceeding, the Township claimed that its insurance carrier should pay the six-month-old outstanding judgment against the Township; and argued that the District Court had no jurisdiction over that portion of the motion which sought an order directing the Township to pay the judgment entered against its police officers; the Township also claimed that payment of such judgment by the Township would be contrary to the law of the State of New Jersey, in spite of the existing collective bargaining agreement.²

Neither attorney for the Township requested an adjournment or continuance of the hearing; nor did the Township request an

2. As a result of separate but parallel proceedings initiated by the respondent police officers against the Township in the state court, the Superior Court of the State of New Jersey granted the police officers' motion for summary judgment on October 6, 1986, and ordered the Township to pay or have paid the judgments entered against the individual police officers in this federal civil rights action, and rejected the Township's argument that payment of such judgments by the Township was contrary to the law of the State of New Jersey (*En Banc* Opinion, Appendix A at 13a fn. 3).

evidentiary hearing.

The District Court granted respondents' motion and entered the order appealed from, directing the Township to pay the outstanding federal judgment entered against itself as well as to pay the outstanding federal judgments entered against its police officers (Appendix D at 106a-108a).

The Township thereafter complied with that portion of the April 25 order directing it to pay the judgment entered against itself (*En Banc* Opinion, Appendix A at 13a fn. 2), and appealed from those portions of the order which directed it to pay the judgments entered against its police officers.

C. The Proceedings in the United States Court of Appeals for the Third Circuit

The majority opinion of the Third Circuit panel reversed the District Court's order, and held that the respondents' enforcement proceeding of their federal judgments could not be adjudicated in the federal court without independent subject matter jurisdiction. Since there was no diversity of citizenship between the Township and its police officers, and no federal question raised in the dispute regarding the collective bargaining indemnity agreement, the respondents could not seek enforcement of their federal civil rights judgment against the judgment debtors by application to the federal court which entered that judgment (Panel Opinion, Appendix B at 48a). The majority opinion also held that the District Court's ancillary jurisdiction did not encompass respondents' Rule 69 proceeding.

Instead, the respondents would have to initiate a New Jersey state court proceeding after some 7 years of federal litigation to obtain aid of execution of their federal judgments.

The majority panel ruled that the District Court had no authority to adjudicate the judgment creditors' claims (Panel Opinion, Appendix B at 50a).

In dissent, then Circuit Judge Gibbons characterized the majority opinion as

bad ancillary jurisdiction law and worse policy.

Panel Opinion, Appendix B at 60a.

Circuit Judge Gibbons observed:

The labored effort of the majority to construct an elaborate "jurisdictional" theory so as to deprive courts of the capacity to enforce their money judgments by garnishment of third party debts owed to judgment debtors is fundamentally unsound. The proposition that any court must have an independent source of subject matter jurisdiction in order to enforce claims owed to judgment debtors is inconsistent with any rational approach to judicial administration. Endorsing the conduct of the compensated liability insurance carrier that defended this case by reversing the district court is an open invitation to similar conduct by other carriers. The majority opinion will, I am confident, be deplored by district judges who in so many cases must deal with indemnitors that control prejudgment litigation by virtue of their covenants to defend.

Id. The dissent found the post-judgment proceedings authorized both by Rule 69, as a proceeding supplementary to and in aid of a judgment, and by Rule 13(g) which permits cross-claims to

be raised at any time, and to be adjudicated separately from the main trial. Since the New Jersey statutes permitted adjudication of such claims in aid of execution of judgment, and since by virtue of Rule 69 the New Jersey enforcement statutes constitute "[t]he practice and procedure of the state in which the district court is held" the federal District Court had jurisdiction to adjudicate the respondents' claims.

Presented with the issue of whether the federal District Court was powerless to conduct post-judgment enforcement proceedings in aid of execution of its own judgments unless there exists an independent basis for subject matter jurisdiction, the Third Circuit granted respondents' petition for rehearing *en banc*, and withdrew the Panel Opinion.

Upon rehearing by the full court, the Third Circuit, in an opinion written by Third Circuit Chief Judge Gibbons, affirmed the order of the District Court, holding:

The district court had ancillary jurisdiction to proceed against the Township by garnishment proceedings to enforce the Township's contract indemnification undertaking. Both Rule 69(a) and Rule 13(g) provide procedural mechanisms for the exercise of that ancillary jurisdiction. The district court's holding that the Township owed a duty to indemnify the officers and that the judgment creditors of the defendant police officers could reach the Township and enforce that duty is consistent with New Jersey law. The order appealed from will therefore be affirmed.

En Banc Opinion, Appendix A at 23a.

The majority of the Third Circuit, sitting *en banc*, held that

principles of ancillary jurisdiction favored the exercise of such jurisdiction in the case at bar; six of the judges found that Rule 69 of the Federal Rules of Civil Procedure, as supplemented by New Jersey law, provided the procedural mechanism for the enforcement proceedings in the District Court. Chief Judge Gibbons also found that Rule 13(g) of the Federal Rules of Civil Procedure supported the action of the District Court, an issue which two of the majority and the concurring judge found unnecessary to reach.

The three dissenting judges agreed that Rule 69 provided a procedural mechanism with which to enforce federal judgments. The dispute between the majority and dissent was founded in their respective interpretations of New Jersey law.

SUMMARY OF ARGUMENT

Petitioner's contention that neither Rules 69(a) nor 13(g) conferred jurisdiction on the District Court over respondents' proceeding in aid of execution of its unsatisfied judgments is without merit. The federal judgments entered against the Township and against its police officers remained unsatisfied; all parties concerned — the Township, its police officers and the judgment creditor respondents — were before the court; the procedure employed by the District Court in aid of execution of the unsatisfied judgments was clear and in accordance with the procedure of the state in which the District Court was held. The proceeding to enforce its judgments concerned the adjudication of a claim involving identical facts and parties to the original, underlying dispute, thus preserving judicial resources and economy. The court had ancillary jurisdiction to enter the order in question in an effort to enforce its judgments, and in fairness to the litigants.

The decision of the Third Circuit Court of Appeals sitting *en banc* is not in conflict with the decision of any other federal court of appeals on the matter. The opinions of the Third and Fifth Circuit Courts of Appeals are consistent in their rationale, and distinguished by their differences. Both applied the same principles and policy to reach different results clearly justified by their respective facts.

ARGUMENT

I.

Rule 69 and New Jersey practice and procedure conferred jurisdiction on the District Court, as a proceeding supplementary to and in aid of execution of a federal judgment, to adjudicate the respondents' claims; principles of equity and policies of judicial efficiency and economy were present to justify the District Court's exercise of its ancillary jurisdiction. The petition does not present an important question of federal law.

Federal courts retain jurisdiction over cases tried before them until such time as the judgments resulting therefrom are satisfied, in order to protect and effectuate such judgments. *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187, 18 L. Ed. 768 (1868); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983); *Resident Advisory Board v. Rizzo*, 526 F. Supp. 778, 779 (E.D. Pa. 1981).

Since there was an outstanding, unsatisfied judgment in favor of respondents against both the Township and its police officers, the Third Circuit properly held that the District Court was empowered to pursue the remedies provided in Rule 69(a) and by appropriate New Jersey procedure to enforce its judgment, including the entry of an order that the Township pay both the judgment against it and that against its police officers. *Spain v. Mountanos*, 690 F.2d 742, 744-45 (9th Cir. 1982); *Green v. Benson*, 271 F. Supp. 90, 93 (E.D. Pa. 1967).

When a litigant expresses its unwillingness to comply with a valid judgment of a federal court, that court has statutory authority pursuant to Rule 69 to insure compliance with its lawful orders and judgments. *Gates v. Collier*, 616 F.2d 1268, 1271-72 (5th Cir. 1980). As expressed in the *en banc* opinion in this matter:

At the heart of the appeal lies a disagreement amongst the insurance carrier, the township and the individual police officers.

En Banc Opinion, Appendix A at 4a. The result was a failure to comply with the lawful, unappealed final judgment of the district court, and the inability of the respondents to collect the valid judgments.

The District Court had presided over the seven week trial of this civil rights action. It heard all the testimony regarding the actions taken by both the police officers and the Township respecting the respondents; it examined all documents offered and/or received in evidence, including the Township's 1978 resolution, its police department's rules and procedures, and its applicable collective bargaining agreement with the police officers' union. The District Court knew that pursuant to these documents the Township had provided and paid for defense counsel for all respondent police officers, and had repeatedly made representations that it would "carry the freight" of the litigation (Hearing held April 25, 1985 in the United States District Court, Appendix C at 89a). The District Court was also aware that it had been conceded during trial and by all parties that the police officers were acting under color of law when they violated the respondents' civil rights, and that the jury had been charged this as a matter of law, without objection.

As this Court stated in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966), considerations of judicial economy, convenience and fairness to the litigants are the applicable criteria for a federal court's exercise of ancillary jurisdiction over state claims of indemnity between its judgment debtors and judgment creditors.

In order to determine whether the police officers were acting

in the performance of their duty so as to require the Township to pay a judgment "arising out of or incidental to the performance of (the officer's) duty" (*En Banc* Opinion, Appendix A at 4a; Hearing held April 25, 1985 in the United States District Court, Appendix C at 91a) it was necessary to know what happened on the night in question — the subject of the seven-week trial in the federal court. Considerations of judicial economy, convenience and fairness to the litigants should not require respondents to relitigate this matter anew before a state court, or require imposing upon them the financial obligation of obtaining the trial transcript, and imposing upon a state court the heavy and inappropriate burden of reviewing thousands of pages of transcript of the federal trial when the judge presiding over that trial already had intimate knowledge and familiarity with the facts proven at the trial.

Resolution of the claims of the police officers against the Township judgment debtor cannot be separated from the facts which underlie the federal judgments. There was thus a close and direct relationship between the disputed claims of the judgment debtor police officers against the judgment debtor Township, and the claims of the respondents judgment creditors which underlied the federal judgment. Here, the "debt" between the judgment debtors was the promise by the Township to pay a judgment arising out of or incidental to the performance of the officer's duty. The adjudication of this dispute in the ancillary proceeding required consideration of the factual circumstances giving rise to the federal judgment. Under these circumstances the claims should, and, in fairness, must be adjudicated by the federal court which rendered the judgment.

As Circuit Judge Becker found in his concurring opinion:

The Rule 69 proceeding required an analysis of the same factual events at issue in the principal litigation.

En Banc Opinion (Becker, J., concurring), Appendix A at 27a.

A balancing of the equities also strongly favored finding ancillary jurisdiction, since

Under the facts, adjudication of the enforcement phase of this case involved a common nucleus of operative fact with the underlying claim, impinged on no federal policy, and advanced convenience, judicial economy and fairness.

Id.

The dissent acknowledged "that a United States district court has ancillary jurisdiction to execute on its judgment", and, "that Federal Rule of Civil Procedure 69 governs how that ancillary jurisdiction is to be exercised, namely 'in accordance with the practice and procedure of the state in which the district court is held' " (*En Banc* Opinion (Stapleton, J. dissenting), Appendix A at 30a).

The majority of the court found that the New Jersey statutory scheme "authorizes the adjudication of a dispute between a judgment debtor and a third party so as to assure the satisfaction of a judgment" (*En Banc* Opinion, Appendix A at 15a); the dissent disagreed, finding that the "practice and procedure" in New Jersey "does not authorize what transpired in this case". (*En Banc* Opinion, Appendix A at 30a). The dispute over the interpretation and breadth of the New Jersey statutory scheme applicable to the enforcement of a judgment of a federal court sitting in that state is not an important question of federal law which need be settled by the Supreme Court of the United States.

II.

The *En Banc* Opinion of the Third Circuit is not in conflict with the opinion of the Fifth Circuit in *Berry v. McLemore*, 795 F.2d 452 (5th Cir. 1986); the opinions are consistent in their rationale, and in their application of principles and policies; they are merely distinguished by their factual differences.

In 1980 Berry instituted a civil rights action under 42 U.S.C. § 1983 against a police officer and his employer, the Town of Maben, Mississippi. However, after trial all claims against the Town were dismissed, and Berry recovered damages only against the officer, with attorney's fees and costs awarded also only against the officer. On Berry's appeal in March, 1982 a unanimous Fifth Circuit Court of Appeals affirmed the directed verdict dismissing the action and all claims against the Town. *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982) (*Berry I*).

When the police officer failed to satisfy the judgment by December, 1982, Berry began a separate, independent "action as a 'suggestion of garnishment' against the Town for the amount of the judgment, costs, attorney's fees awarded in the initial suit". *Berry v. McLemore*, 795 F.2d 452, 453 (5th Cir. 1986) (*Berry II*). In support of this new action, Berry made claims regarding out-of-court promises made to him by Town officials, and the existence of a prejudicial conflict of interest with his trial counsel. In September, 1983 Berry "filed another 'suggestion of garnishment' against" the Town's liability insurer, *Berry II*, 795 F.2d 453-54, alleging that the insurer was liable to the police officer in contract and indemnity.

A jury trial on Berry's claims raised in this new, independent action was conducted in June, 1985. At the close of evidence the district court directed verdicts for both the Town and its insurer, and against Berry. In doing so, the trial court, *inter alia*, applied

Mississippi law to hold that Berry could not recover on a writ of garnishment against the Town.

A second appeal to the Fifth Circuit Court of Appeals resulted in an affirmance of the decision of the district court directing verdict for the insurer under the terms of the policy and applicable Mississippi case law. But, finding , "no federal jurisdiction over the action by Berry against the Town", the Court of Appeals dismissed Berry's claims against the Town without reaching the district court's finding on "the Mississippi law of garnishments." *Berry II*, 795 F.2d 454.

Berry's second actions were characterized by the Court of Appeals as independent actions from the first civil rights suit, requiring a separate basis for federal jurisdiction against each defendant. The court gave two reasons: the second action was not filed as part of the original action; and it was not filed against a party liable on the first action. Although the Town was a party to the first action, all claims against it had been dismissed, and it incurred no liability to Berry by the first action, and was therefore not bound by that judgment.

The court repeatedly emphasized that its ruling was based on the procedural posture of the case before it, noting:

We can find no case where a court held that it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment.

(Emphasis in original.) *Berry II*, 795 F. 2d 455.

In *Berry*, the concepts of ancillary jurisdiction were not addressed because the action was brought as a separate action.

The glaring distinctions between *Berry I* and *Berry II* and the post-judgment proceeding below show the cases not to be in conflict, and, on the contrary, consistent in their reasoning and the application of existing policy and principles.

Respondents filed their claim below not as a new and independent action, but as part of the original action; as a post-judgment Rule 69 proceeding supplementary to and in aid of execution of the original judgment. This proceeding followed entry of the judgments and the Township's refusal to satisfy them; it did not follow, as *Berry II* did, an unsuccessful appeal from the judgments. Additionally, the Township was not a legal stranger to the respondents' judgments as the Town was to Berry's judgment. The Township of Edison was not dismissed from the original action, but was found liable to respondents, and, by virtue of its refusal to pay even that portion of the judgment entered directly against it, still subject to the jurisdiction of the District Court.

Ancillary jurisdiction thus clearly existed over the respondents' Rule 69 supplementary proceeding against the Township, when it clearly did not exist over Berry's claims against the Town and its insurer, raised for the first time in a separate, independent action brought against legal strangers who were in no way bound by the original judgment.

So too, of course, considerations of judicial economy, convenience and fairness to the litigants which justified ancillary jurisdiction below, did not exist in *Berry II*, which raised new factual issues, requiring a second jury trial to resolve. The existence and nature of the alleged out-of-court statements which Berry claimed the Town had made him, did not involve a common nucleus of operative fact with the underlying claim. In contrast, as Circuit Judge Becker noted:

The Rule 69 proceeding required an analysis of the same factual events at issue in the principal litigation. Even the ultimate determination of whether the policemen were acting in the scope of their duties and were covered by the collective bargaining agreement related to the question in the original litigation of whether the officers were acting under color of state law.

En Banc Opinion (Becker, J., concurring), Appendix A at 27a.

No conflict exists between the opinions of the Third Circuit below and that of the Fifth Circuit in *Berry II*. Rather, *Berry II* would have been similarly decided by the Third Circuit considering the obvious and important differences in legal issues and policy considerations present in each case.

CONCLUSION

WHEREFORE, respondents Marcos Skevofilax, Louise Skevofilax, and Michael Michaels respectfully request that the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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CAROL MELLOR

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